

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THELMA N. BURNHAM and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACTS MANAGEMENT AGENCY, St. Augustine, FL

*Docket No. 03-1371; Submitted on the Record;
Issued July 23, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant had abandoned her request for a hearing before an Office hearing representative.

In a decision dated April 15, 2002, the Office denied appellant's claim for an injury on February 15, 2002. On May 13, 2002 she requested an oral hearing before an Office hearing representative. On January 9, 2003 the Office issued a notice advising that a hearing would be held at a specific time and place on February 14, 2003.

In a decision dated February 26, 2003, the Office found that appellant abandoned her request for a hearing. The Office noted that she failed to appear at the hearing and that the record gave no indication that appellant had contacted the Office either prior or subsequent to the scheduled hearing to explain her failure to appear.¹

The Board finds that the Office properly found that appellant had abandoned her request for a hearing before an Office hearing representative.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

“A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the

¹ The record contains additional evidence which was not before the Office at the time it issued its February 26, 2003 decision. Therefore the Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422 (1997).

postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.”

“A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.”²

These regulations, however, were again revised effective January 4, 1999. The regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.³ Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office’s procedure manual. Chapter 2.1601.6e of the procedure manual dated January 1999 provides as follows:

“e. Abandonment of Hearing Requests.

“(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

² 20 C.F.R. § 10.137(a), 10.137(c) (revised as of April 1, 1997).

³ 20 C.F.R. § 10.622(b) (1999).

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is therefore expected to attend the hearing, and the claimant does not attend.”⁴

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on February 14, 2003. The record shows that the Office mailed appropriate notice to the claimant at her last known address. Although appellant urges on appeal that she did not receive such notice, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.⁵ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁶ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.⁷

In this case, the record supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure to appear within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office’s procedure manual, the Board finds that appellant abandoned her request for an oral hearing before an Office hearing representative.⁸

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6e (January 1999).

⁵ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office duly mails a properly addressed letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

⁶ *Michelle Lagana*, 52 ECAB 187 (2000).

⁷ *See Larry L. Hill*, 42 ECAB 596 (1991).

⁸ *Levi Drew, Jr.*, 52 ECAB 442 (2001).

The decision of the Office of Workers' Compensation Programs dated February 26, 2003 is affirmed.

Dated, Washington, DC
July 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member